



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Review Commission Affirms General Duty Clause Citation After Judicial Error

August 17, 2022

Manesh Rath

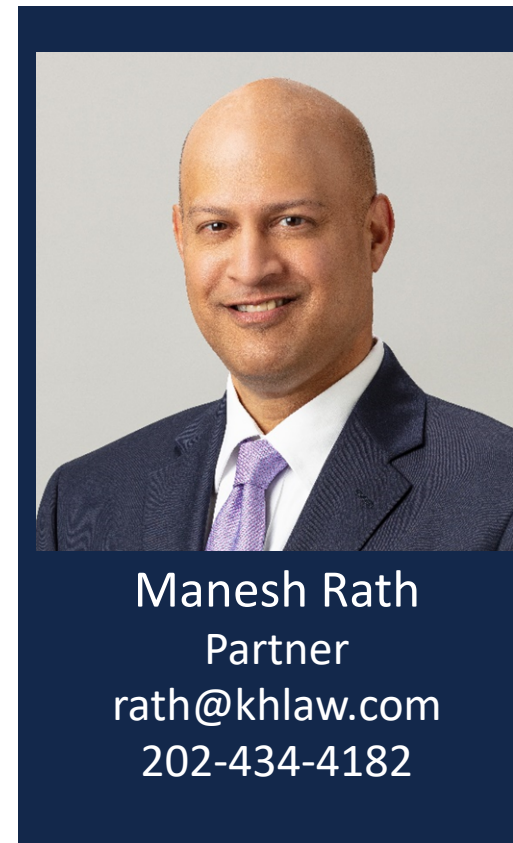


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



Manesh Rath
Partner
rath@khlaw.com
202-434-4182

Taylor Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



Topics to be Discussed

- ◆ Background of the Incident
- ◆ General Duty Clause
- ◆ Judge's Error
- ◆ Definition of Hazard
- ◆ Review Commission Decision
- ◆ What Employers Should do
- ◆ Off the Record

Background of the Incident

- ◆ Henkels & McCoy (H&M) is a utility construction, design, and engineering contractor head quartered in Blue Bell, PA
- ◆ On May 2, 2018, two H&M employees attempted to remove a utility pole with a digger derrick
- ◆ The crew leader was injured while attempting to remove a utility pole with a digger derrick and later died from his injuries



Citation

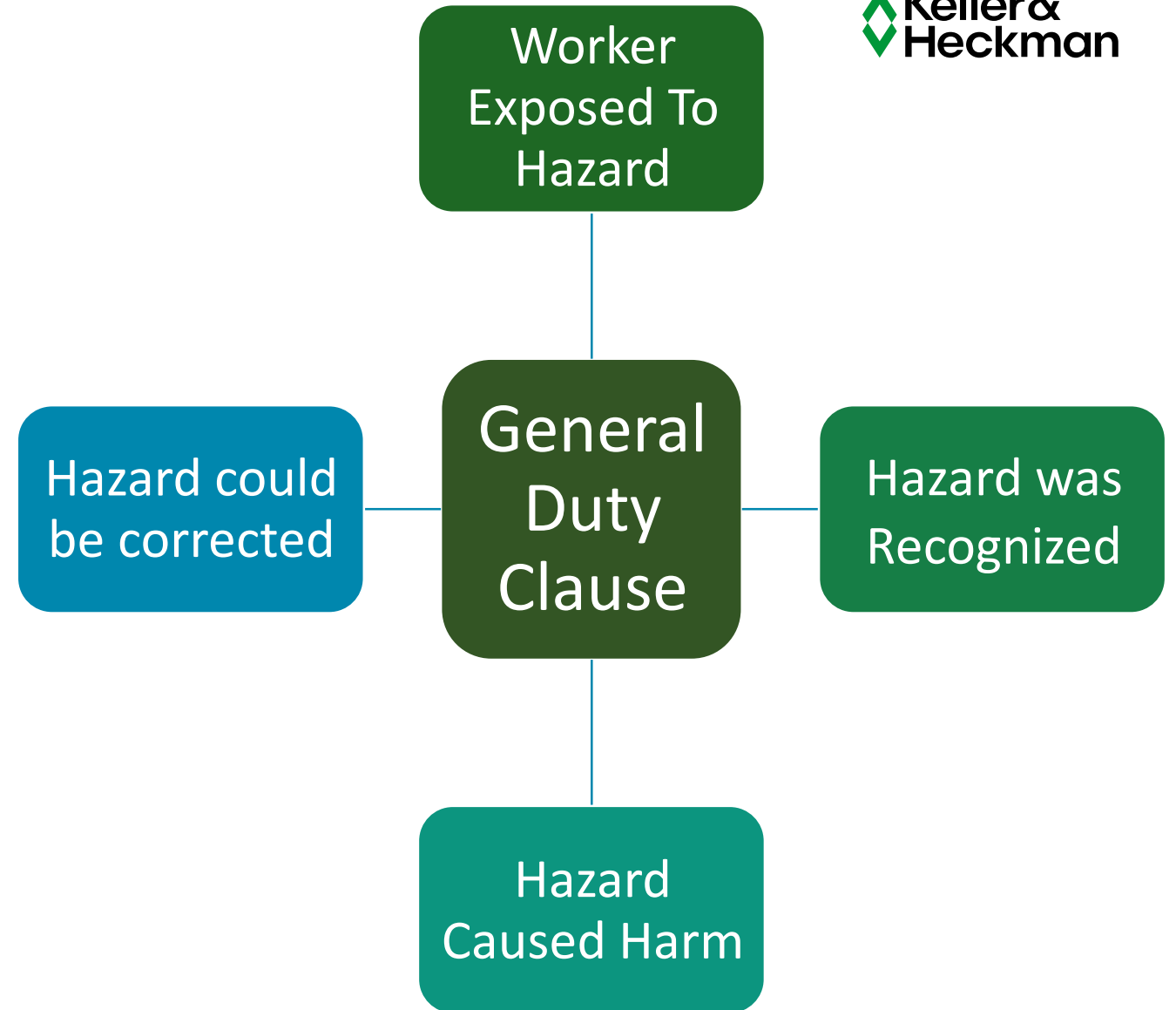


- ◆ Total penalty amount: \$12,934
- ◆ H&M cited under the general duty clause
- ◆ H&M contested the citation and the ALJ vacated the citation. OSHA appealed the decision

General Duty Clause

GDC States:

Each employer shall furnish ... a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;



Judge's Error



- ◆ Review Commission held that Judge Gatto plainly erred by redefining the alleged hazard
- ◆ Review Commission held that “it is the hazard, not the specific incident that resulted in injury or might have resulted in injury that is the relevant consideration in determinizing the existence of a recognized hazard.”

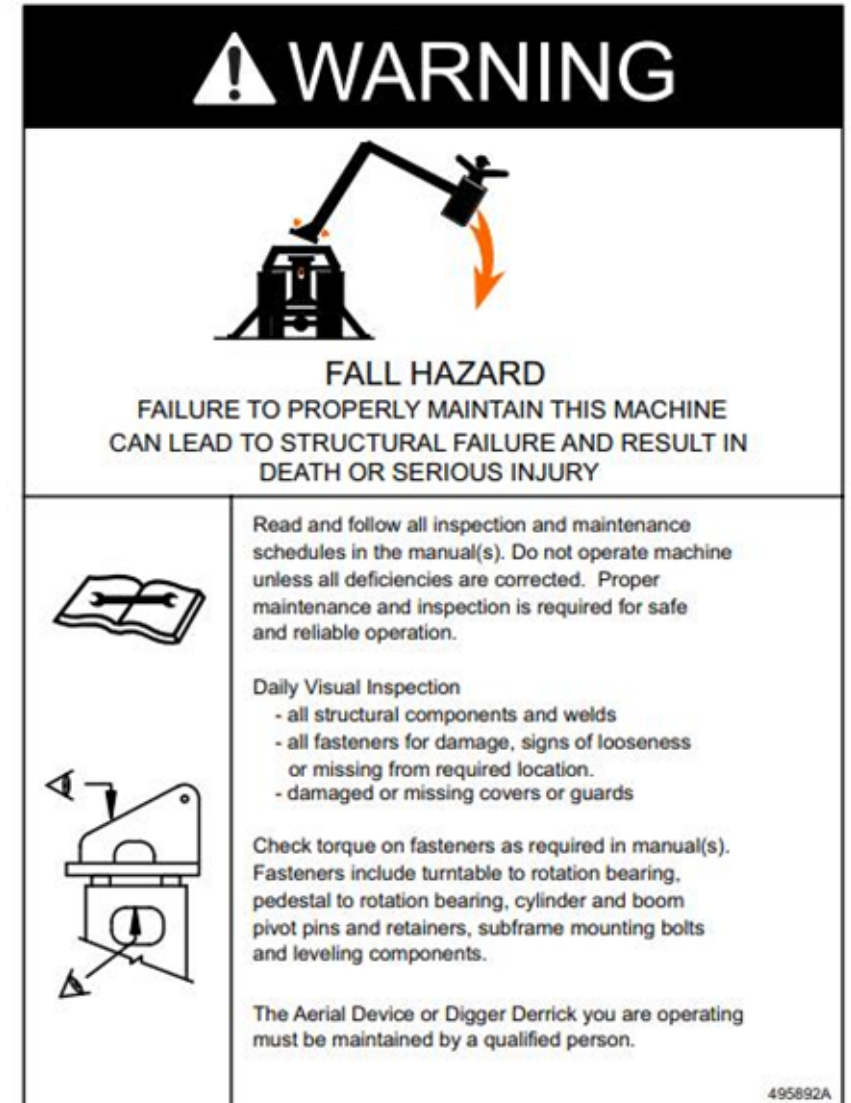
Hazard

H&M expert says: “bolts were sufficiently tight, and the failure was due to the design defect”


OSHA expert says: Decal specifically warned about this hazard

ALJ: The failure to maintain the bolts did not cause a significant risk of harm


Review Commission: OSHA’s expert specifically addresses the cited conditions, and his testimony was consistent with the decal



! WARNING



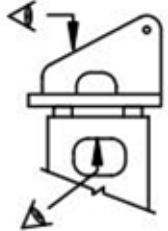
FALL HAZARD
FAILURE TO PROPERLY MAINTAIN THIS MACHINE
CAN LEAD TO STRUCTURAL FAILURE AND RESULT IN
DEATH OR SERIOUS INJURY



Read and follow all inspection and maintenance schedules in the manual(s). Do not operate machine unless all deficiencies are corrected. Proper maintenance and inspection is required for safe and reliable operation.

Daily Visual Inspection

- all structural components and welds
- all fasteners for damage, signs of looseness or missing from required location.
- damaged or missing covers or guards



Check torque on fasteners as required in manual(s). Fasteners include turntable to rotation bearing, pedestal to rotation bearing, cylinder and boom pivot pins and retainers, subframe mounting bolts and leveling components.

The Aerial Device or Digger Derrick you are operating must be maintained by a qualified person.

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Recognition (Actual v. Industry)



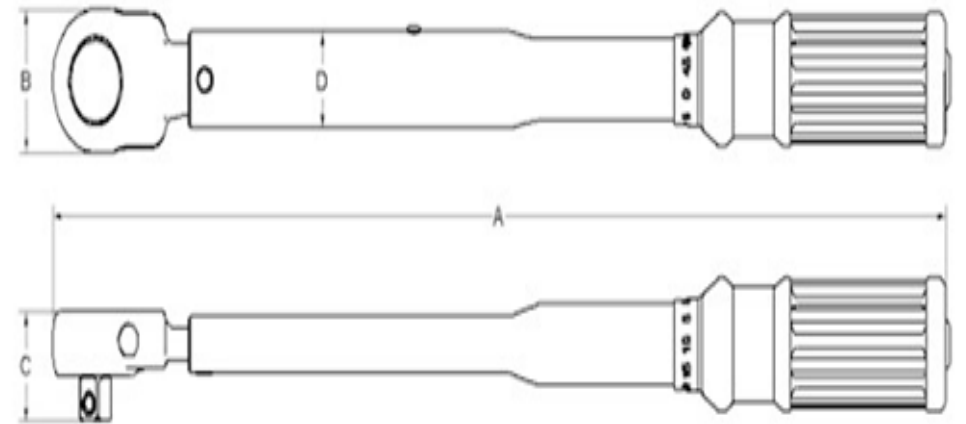
OSHA argues that since the ANSI standard recommends periodic maintenance of the bolts of digger derricks, the industry has recognized the hazard

Review Commission: ANSI standard does not link failure to perform periodic maintenance to hazard, but the manufacturer's decal provides sufficient and plain warning of the hazard and thereby constitutes industry recognition

Abatement

OSHA argued the simplest way to abate the hazard would be to perform torque testing

H&M concedes that torque testing is both economically and technologically feasible.



Affirmative Defenses



- ◆ H&M argued reliance on Diversified’s digger derrick inspections and lacked constructive knowledge of the violative condition
 - ◆ Review Commission says H&M has expertise in this area since they performed the torque testing before contracting the duty to Diversified and H&M made no effort to review Diversified’s safety reports
- ◆ H&M argued “unpreventable employee misconduct” since the injured employee continued to use the equipment even after a bolt was displaced
 - ◆ Review Commission reiterated the company focused on the cause of the incident rather than on its alleged failure to properly maintain the bolts on the digger derricks (which is the basis for the citation).

What Employers Should Do

Recall does not eliminate employer responsibility for reasonable diligence

Create a routine inspection and PM program, written. Document all elements covered in each inspection.

If contracting with a third party to create safety testing reports, an Employer must be aware of what is in the report

Read all manuals and decals related to equipment



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Wednesday, September 14, 2022
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Please join us at 1:35 PM Eastern U.S.
Wednesday, October 12, 2022
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Next session to be scheduled
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Manesh Rath

Partner

1001 G Street N.W. Ste. 500W

202.434.4182

rath@khlaw.com



Stick around for Off the Record

Taylor Johnson

Associate

1001 G Street N.W. Ste. 500W

202.434.4255

johnsont@khlaw.com

